IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

APPEAL (LODG.) NO.687 OF 2007
IN
NOTICE OF MOTION NO. OF 2007
IN
SUIT (LODG.) NO.2116 OF 2007

Rolv Berg Drive A/S
having its registered office at
Soundrez Tollbedgate 15,
P.O. Box No.96, N-9251 Tromso,
Norway and having their project
Office at 214 Ajanta Executive
Centre, Ajanta Hotel, 8 Juhu Tara
Road, Santacruz (West),
Mumbai 400 049. ..Appellant.

Vs.

1. Oil and Natural Gas Corporation Ltd.
having their office at Mumbai Region,
Offshore Logistics
Marine Planning Cell,
7th Floor, 11 High Office Complex,
Bandra-Sion Link Road,
Mumbai 400 017.

2. Handelsbanken
registered under the Laws of Norway,
having its head office at
Roald Amundsens PL
P. O. Box 91, 9251 Tromse,
Norway. ..Respondents.

……

Mr. Atul Rajyadhyaksha, Senior Advocate with Mr. Simil Purohit i/b M/s. Udwadia & Udeshi for the Appellants.
Mr. Rajeev Kumar i/b M/s. M. Dhruva & Co. for the Respondents.

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CORAM : SWATANTER KUMAR, C.J. &
DR. D.Y. CHANDRACHUD, J.

Judgment reserved on 26th September, 2007.
Judgment pronounced on 29th September, 2007.

JUDGMENT (Per Dr. D.Y. Chandrachud, J.)

1. The Appeal arises out of an order passed by the Learned Single Judge declining to grant a prayer for ad interim relief on the encashment of a bank guarantee in the amount of US $ 442,150.

2. The First Respondent had issued a global tender on 27th June, 2006 inviting bids for the charter hire of Anchor Handling Tugs cum Supply Vessels, Platform Supply Vessels and Offshore Supply vessels for offshore operations. The Appellant submitted its bid on 2nd August, 2006. The contract was awarded to the Appellant by the First Respondent by a communication dated 19th February, 2007 for the charter hire of an Anchor Handling Tug by the name of "Aldoma". The Appellant submitted a performance bank guarantee on 28th February, 2007 in the amount of US $ 442,150. By a letter dated 11th July, 2007 the Appellant informed the First Respondent that the Director of Shipping and Navigation of the Government of Norway had recently issued guidelines to

ship operators and owners in Norway with regard to supply ships and tugs used for anchor handling. The Appellant claimed that on careful examination of the guidelines, it appeared that the vessel for which the contract was awarded to the Appellant would not be able to comply with the stipulations contained therein and that the Appellant would not be able to handle the work at the specified water depth under the contract. The Appellant expressed its inability to perform the contract as a result of the action of the Government of Norway and invoked the Force Majeure Condition. The Appellant expressed its willingness to supply a substitute vessel, though at revised rates. On 16th July, 2007 the First Respondent addressed a letter to the bankers invoking the bank guarantee which led to the institution of the suit. On an application for ad interim relief, the Learned Single Judge passed an order dated 7th August, 2007 declining to restrain the encashment of the bank guarantee. That order has been questioned in these proceedings.

3. The Learned Single Judge held that (i) even a liberal reading of the plaint as a whole would demonstrate a complete absence of material facts to sustain the inference that the

invocation of the bank guarantee was fraudulent; (ii) The Force Majeure clause of the contract – Clause 23 – inter alia covered Acts and Regulations of the respective governments of the two parties; the guidelines placed before the Court made no reference to any provisions under which they were issued and at best appear to be directory administrative instructions issued by the Norwegian Maritime Directorate; (iii) The question as to whether the guidelines were regulations and had the force of law, is a matter of foreign law which insofar as the Courts in India are concerned would have to be proved as a question of fact; (iv) The vessel Aldoma was to be mobilized on or before 12th July, 2007, but it was abundantly clear from the Appellant's letter dated 25th June, 2007 that the vessel had been taken away by the owners to Nigeria even before that date; (v) In the circumstances the Appellants were clearly not in a position to fulfill their obligations under the contract on the date fixed for mobilization; (vi) The Appellants in fact offered a substitute vessel, but this was only against the payment of higher rates.

For these reasons the Learned Single Judge held that no case was made out for the grant of ad interim relief.

4. At the hearing of the Appeal it has been urged on behalf of the Appellant that the contract was awarded on 19th February, 2007, but the guidelines were issued thereafter by the Norwegian Maritime Directorate on 21st June, 2007. Hence, it was submitted that the performance of the contract was rendered impossible by a supervening event viz. the enforcement of the guidelines. The submission was that once the main contract between the parties had been rendered void, the contract of guarantee which was supplementary to the main contract ceased to be effective and the Appellants were absolved of their obligations by virtue of the provisions of Section 56 of the Contract Act.

5. The submission which has been urged before the Court revolves around the defence that the main agreement between the parties stands frustrated upon the guidelines issued by the Norwegian Maritime Directorate on 25th June, 2007. According to the Appellant the effect of those guidelines is to prevent the deployment of the Aldoma in depths exceeding 600 mtrs. Ever since the judgment of the Supreme Court in **Satyabrata Ghose v. Mugneeram Bangur and Co.**[1], it is a settled principle of law that

1 AIR 1954 SC 44.

the doctrine of frustration is a part of the law of discharge of contract by reason of a supervening impossibility or illegality of the act agreed to be done. In **Sushila Devi v. Hari Singh**[2] the Supreme Court held that the impossibility which is contemplated by Section 56 of the Contract Act is not merely confined to something which is not humanly possible but extends to situations in which the performance of the contract becomes impracticable or useless having regard to the object and purpose which the parties had in view. But, as the Supreme Court held, the supervening events should take away the basis of the contract and must be of a character that strikes at the root of the contract. A statutory injunction by a statutory authority may be one of such causes. (**M. D., Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.**[3] In the Law of Guarantees by Geraldine Mary Andrews and Richard Millett the position in law has been summarized thus :

> "Where the making or the performance of a contract is prohibited by law such that it is void and of no legal effect, the normal result is that the creditor cannot enforce a guarantee of such a contract against the surety. …..
>
> The same result will arise where the principal obligation is void for reasons of public policy or on the grounds that it is penal. ….

2 AIR 1971 SC 1756.
3 AIR 2004 SC 1344 at paragraph 109 page 1369.

> The illegality of the principal obligation will not always discharge the surely. ….. the creditor who is innocent of the illegality and who has not participated in it may in certain circumstances still be able to enforce the guarantee against the surety. However, in such a case, the creditor would be able to enforce the principal obligation against the principal as well, and the surety's liability would involve no departure from the co-extensiveness principle. Second, where only certain parts of the principal contract are illegal or contrary to public policy, such as contracts in restraint of trade, such that the court would sever them from the rest of the agreement, leaving the remainder of the contract valid and enforceable, the guarantee would remain similarly enforceable to the same extent, and the surety will be relieved from liability only in respect of the obligation which had been severed."

6. The contention of the Appellant before this Court is that the effect of the Norwegian guidelines is to render the deployment of the Aldoma impermissible in depths exceeding 600 mtrs. On behalf of the First Respondent it has been stated in the affidavit in reply filed before the Learned Single Judge that before a 'job of tow' is undertaken, an expert agency specified in the contract is hired by the First Respondent to advise and supervise the job of towing. It is based on the expert opinion that the First Respondent provides a suitable tug out of its fleet of vessels and it is only after the acceptability of the tug by the expert on the job is a particular job undertaken. Hence, it has been submitted that even assuming

that the guidelines of the Norwegian authorities were correct and were required to be followed, Noble Denton who are the experts designated under the contract should decide upon the suitability of the tug for a specific job. ONGC has in fact made the following assurance before this Court on affidavit :

> "If it is found by the expert agency that Aldoma would not be appropriate for a particular job the Defendant No.1 would not use it for that particular job but would use it for several other assignments and operations during the tenure of the contract only on the advise of experts."

The assurance was reiterated before this Court in the course of the submissions urged on behalf of the First Respondent.

7. The scope of work under the contract covers several areas of deployment. In the present case, the scope of work under the contract was as follows :

> "a) To carry out towing operations in Offshore;
>
> b) To carry men and materials between base and offshore installations, as well as between offshore installations only where such facilities are available;
>
> a) To carry out standby and rescue operations in offshore, if required;
>
> b) To assist in exigencies arising in offshore;

c) To carry out routine surveillance in offshore for safety and security reasons;

d) Standby at SBM tankers in offshore;

e) To assist in mooring daughter vessel to mother vessel and securing to SBM;

f) To carry out any other field work as instructed by base / field in charge;

g) To carry out any other field work which may be within the natural capabilities of the chartered vessel, as instructed by base/ field incharge of ONGC's own operations and that of JV/ NELP partners;

The above work shall always be performed within the vessel's natural capabilities and within safe parameters."

The First Respondent furnished an assurance on affidavit before the Learned Single Judge that it would abide by all directions issued by the consultants named in the contract for the utilization of the tug for specific work. Under Clause 23 of the contract, the Force Majeure conditions inter alia include "Acts and Regulations of the respective governments". The case before the Learned Single Judge as well as before this Court was argued on the basis that the guidelines issued by the Norwegian Maritime Directorate constituted a Regulation of the Government of Norway. The question as to whether the guidelines are directory in nature or constitute mandatory regulations of a foreign government is a

matter of foreign law which insofar as the Courts in India are concerned would have to be established as a question of fact. (**Hari Shankar Jain v. Sonia Gandhi**[4]). This is a matter upon which a determination will have to be made in the arbitral proceedings. Similarly, the question as to whether those guidelines completely disable the deployment of Aldoma under the contract with the First Respondent is an issue on which the adjudication would have to be rendered in the course of the arbitral proceedings; parties having agreed to an arbitration under the contract. At this stage, it cannot be said that the Appellants have made out a prima facie case for the grant of an ad interim order. Even if the guidelines were to be regarded as Regulations of a foreign Government, there is prima facie merit in the contention of the First Respondent that the scope of the work under the contract is wide enough to include work, the performance of which does not infringe the guidelines.

8. Under the terms of the contract, the mobilization of the Aldoma was to take place by 12th July, 2007. By a letter dated 25th June, 2007 the Appellant informed the First Respondent that the

4 2001(8) SCC 233.

Aldoma had been taken to Nigeria by the North Offshore A/S of Tromso Norway. The Appellant accepted that this action had created 'legal implications and breach of the contract' against which the Appellant was taking legal recourse, as a result of which the mobilization of the vessel would be delayed beyond 12th July, 2007. The Appellant stated that it was arranging a substitute vessel meeting the specifications of the First Respondent so that the work of the First Respondent was not adversely affected, in case the Appellant was not able to deploy the Aldoma under the contract. This was followed by the Appellant's letter dated 11th July, 2007 stating that while the Appellant was ready and willing to supply a substitute vessel, the hiring of a vessel with higher specifications would be at an increased rate and that the Appellant would be willing to negotiate provided the First Respondent was willing to revise the contractual rates. The Learned Single Judge was justified, having regard to this sequence of events, in coming to the conclusion that the Appellant had failed to discharge its obligation under the contract of making necessary arrangements for the mobilization of the vessel by the date prescribed under the contract and that the vessel was in fact beyond the control of the Appellant, having sailed away to Nigeria. The vessel, it must be noted was

prior to the award of the contract which forms the subject matter of these proceedings under charter hire by the First Respondent for a period of three years until April, 2007. We have adjourned the hearing of the Appeal with a view to enable the Appellant to inform the Court as to whether it was in a position to provide a substitute vessel with the same specifications. The Appellant has been unable to do so.

9. A performance guarantee must be honoured on its terms. No case of fraud or irretrievable injustice has been made out. A bank guarantee is a contract between the issuing bank and the beneficiary. The guarantee is independent of the underlying contract between the beneficiary and the party at whose behest it is issued. In this case, the rights of the Appellant are sufficiently safeguarded. Should the Appellant establish its claim in the arbitral proceedings, it would be entitled to seek a refund of its monies. Hence, neither has any prima facie case been made out, nor is the balance of convenience in favour of the Appellant. In this view of the matter an ad interim injunction was not warranted.

10. In the circumstances, we do not find any infirmity in the

order passed by the Learned Single Judge. The Appeal shall accordingly stand dismissed.

CHIEF JUSTICE

DR. D.Y. CHANDRACHUD, J.

..14/-

On oral request made by the learned Counsel appearing for the Appellant, the operation of the judgment shall be stayed for a period of two weeks as there was an interim order in favour of the Appellant before the Learned Single Judge as well as during the pendency of this Appeal by this Court. However, this protection shall automatically end and will not be extended beyond the period of two weeks.

CHIEF JUSTICE

DR. D.Y. CHANDRACHUD, J.